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E I DU PONT DE NEMOURS AND COMPANY
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WILMINGTON, DE 19805

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WALKE, AMANDA C	
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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ADRIAN LUNGU

Appeal 2009-010185
Application 09/839,803
Technology Center 1700

Decided: April 16, 2010

Before CATHERINE Q. TIMM, BEVERLY A. FRANKLIN, and KAREN M. HASTINGS, *Administrative Patent Judges.*

HASTINGS, *Administrative Patent Judge.*

REQUEST FOR REHEARING

Appellant, pursuant to 37 C.F.R. § 41.52, has submitted a timely Request for Rehearing dated February 25, 2010 (hereafter the "Request"), limited to requesting rehearing our affirmance of claim 33 of the original Decision in this appeal dated December 24, 2009 (hereafter "Dec.").

In that original Decision dated December 24, 2009, the decision of the Examiner rejecting claims 1, 3-19, and 31-33 under 35 U.S.C. § 103 was

affirmed.[1] This affirmance was based on our agreement with the Examiner's determination that using an onium salt "in a greater reactive amount than the leuco dye" as recited in claim 1 was obvious in light of the prior art (*see generally,* Dec.).

Specifically, Appellant argues that we overlooked and did not properly respond to appealed claim 33 (Request 1). To the contrary, we pointed out that claim 33 was not argued separately from the other claims as required by 37 C.F.R. § 41.37(c)(1)(vii). (Dec. 2). As stated in 37 C.F.R. § 41.37(c)(1)(vii), "A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim."

Appellant's reliance on the statement in the Appeal Brief that "[*f*]*or the reasons stated above"* (Br. 5, emphasis added), coupled with restating the color contrast characteristic claim limitation of claim 33, as evidence that we overlooked claim 33 is not well taken (Request 1; Br. 5). "[T]he reasons stated above" were drawn to Appellant's arguments with respect to the non-obviousness of using an onium salt "in a greater reactive amount than the

[1] Appellant points out that the Board conclusion sustaining the Examiner's § 103 rejection of claims 1-8 indicates that we did not address claim 33 (Request 2). However, we note that we inadvertently did not include the proper claim group only in the "Conclusion" section of our decision (e.g., *compare* Dec. 1 to Dec. 8). Accordingly, we amend our decision to correct this typographical error. Thus, we affirm the Examiner's rejection of claims 1, *3-19, and 31-33* under 35 U.S.C. § 103 (emphasis added). The error was harmless as we had reviewed and considered the correct rejection in making our determination.

leuco dye" as recited in claim 1. Accordingly, this statement is insufficient as an argument for separate patentability.

Moreover, Appellant failed to specifically point out the error in the Examiner's rejection with respect to claim 33. Indeed, Appellant argued that the color contrast characteristic recited in claim 33 is obtained as a result of using the onium salt in an amount greater than the leuco dye (Br. 4, 5). We also stated in our Decision at footnote 2 on page 6:

> Although independent claim 33 is not separately argued, we note that claim 33 does not require any relative amounts of the onium salt versus the leuco dye, and encompasses an intermediate product as well as a final product.

For all the reasons set forth in our Decision, we agree with the Examiner's reasonable conclusion that all of the claims are obvious under 35 U.S.C. § 103.

CONCLUSION

For the foregoing reasons, Appellant has not persuaded us that our decision was in error. We do however modify the "Conclusion" section of our Decision at page 9 to reflect the correct claim grouping, that is, all of the claims 1, 3-19, and 31-33, as affirmed in the sole ground of rejection on appeal.

Appellant's request for rehearing with respect to the § 103 rejection of claim 33 has been granted to the extent that our decision has been reconsidered, but such request is denied with respect to making any modifications to the decision.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

PL Initial:
sld

E I DU PONT DE NEMOURS AND COMPANY
LEGAL PATENT RECORDS CENTER
BARLEY MILL PLAZA 25/1122B
4417 LANCASTER PIKE
WILMINGTON, DE 19805